

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANDREW M. SELLERY,)
Plaintiff,) No. CV-10-322-JPH
v.) ORDER GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,)
Defendant.)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on October 21, 2011 (ECF No. 10, 14). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Debra Meachum represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge (ECF No. 4). On September 19, 2011, plaintiff filed a reply (ECF No. 16). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment (ECF No. 14) and **DENIES** plaintiff's motion for summary judgment (ECF No. 10).

JURISDICTION

Plaintiff filed concurrent applications for supplemental security income (SSI) and disability insurance income (DIB) on October 6, 2008, alleging disability as of December 1, 2001, due to mental and physical limitations (Tr. 135-144). His applications

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1 were denied initially and on reconsideration (Tr. 85-88, 90-93).

2 Administrative Law Judge (ALJ) Moira Ausems held a hearing
3 November 23, 2009. Plaintiff, represented by counsel, and a
4 vocational expert testified (Tr. 43-80). At the hearing plaintiff
5 amended the onset date to December 11, 2006 (Tr. 44). On February
6 26, 2010, the ALJ issued an unfavorable decision (Tr. 19-36). The
7 Appeals Council accepted additional evidence and denied review on
8 July 27, 2010 (Tr. 1-4). The ALJ's decision became the final
9 decision of the Commissioner, which is appealable to the district
10 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
11 for judicial review on September 21, 2010 (ECF No. 1).

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing
14 transcripts, the ALJ's decision, the briefs of both parties, and
15 are summarized here where necessary.

16 Mr. Sellery was 30 years old on the amended onset date and 33
17 on the date of the ALJ's decision (Tr. 156). He is a high school
18 graduate and completed a year of college (Tr. 46). He has worked
19 as a machinist, shipping and receiving clerk, driver, truck
20 driver, telephone solicitor, house cleaner, and machine operator
21 (Tr. 75-76, 171). He sustained a serious closed head injury in
22 2001 as well as a back injury in December 2006. He worked in 2003-
23 2006 and briefly in 2008 (Tr. 44, 46, 49-54). In August 2008 he
24 quit drinking (Tr. 65). Plaintiff suffers from depression,
25 confusion, and problems with memory and concentration. He suffers
26 a lot of anxiety and becomes "easily stressed" due to post-
27 traumatic stress disorder (PTSD). Movement causes pain in his

1 legs, arms, neck, and back. His left hand is frequently numb. He
2 experiences headaches constantly, dizziness occasionally, and
3 sleep problems. His last job in event security required constant
4 standing. He quit because of back pain. (Tr. 46, 54-55, 57-58, 62,
5 70-71, 73). Plaintiff does not take any pain medication (Tr. 57).

6 At the time of the hearing Mr. Sellery was divorced and
7 living with a friend temporarily (Tr. 59-60). He watches
8 television "a lot," does a little vacuuming once in a while, and
9 can only sit for 30 minutes (Tr. 64, 66-67).

10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act (the Act) defines disability as the
12 "inability to engage in any substantial gainful activity by reason
13 of any medically determinable physical or mental impairment which
14 can be expected to result in death or which has lasted or can be
15 expected to last for a continuous period of not less than twelve
16 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
17 provides that a Plaintiff shall be determined to be under a
18 disability only if any impairments are of such severity that a
19 plaintiff is not only unable to do previous work but cannot,
20 considering plaintiff's age, education and work experiences,
21 engage in any other substantial gainful work which exists in the
22 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
23 the definition of disability consists of both medical and
24 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
25 (9th Cir. 2001).

26 The Commissioner has established a five-step sequential
27 evaluation process for determining whether a person is disabled.

1 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
2 is engaged in substantial gainful activities. If so, benefits are
3 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
4 the decision maker proceeds to step two, which determines whether
5 plaintiff has a medically severe impairment or combination of
6 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination
8 of impairments, the disability claim is denied. If the impairment
9 is severe, the evaluation proceeds to the third step, which
10 compares plaintiff's impairment with a number of listed
11 impairments acknowledged by the Commissioner to be so severe as to
12 preclude substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
14 App. 1. If the impairment meets or equals one of the listed
15 impairments, plaintiff is conclusively presumed to be disabled. If
16 the impairment is not one conclusively presumed to be disabling,
17 the evaluation proceeds to the fourth step, which determines
18 whether the impairment prevents plaintiff from performing work
19 which was performed in the past. If a plaintiff is able to perform
20 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
21 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
22 residual functional capacity (RFC) assessment is considered. If
23 plaintiff cannot perform this work, the fifth and final step in
24 the process determines whether plaintiff is able to perform other
25 work in the national economy in view of plaintiff's residual
26 functional capacity, age, education and past work experience. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,

1 482 U.S. 137 (1987).

2 The initial burden of proof rests upon plaintiff to establish
3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

5 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
6 met once plaintiff establishes that a physical or mental

7 impairment prevents the performance of previous work. The burden

8 then shifts, at step five, to the Commissioner to show that (1)

9 plaintiff can perform other substantial gainful activity and (2) a

10 "significant number of jobs exist in the national economy" which

11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

12 Cir. 1984).

13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a
15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

16 the Commissioner's decision, made through an ALJ, when the

17 determination is not based on legal error and is supported by

18 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th

19 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

20 "The [Commissioner's] determination that a plaintiff is not

21 disabled will be upheld if the findings of fact are supported by

22 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th

23 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is

24 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,

25 1119 n. 10 (9th Cir. 1975), but less than a preponderance.

26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);

27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9th Cir. 1988). Substantial evidence "means such
2 evidence as a reasonable mind might accept as adequate to support
3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
4 (citations omitted). "[S]uch inferences and conclusions as the
5 [Commissioner] may reasonably draw from the evidence" will also be
6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
7 review, the Court considers the record as a whole, not just the
8 evidence supporting the decision of the Commissioner. *Weetman v.*
9 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
10 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to
12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
13 evidence supports more than one rational interpretation, the Court
14 may not substitute its judgment for that of the Commissioner.
15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
16 (9th Cir. 1984). Nevertheless, a decision supported by substantial
17 evidence will still be set aside if the proper legal standards
18 were not applied in weighing the evidence and making the decision.
19 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
20 433 (9th Cir. 1987). Thus, if there is substantial evidence to
21 support the administrative findings, or if there is conflicting
22 evidence that will support a finding of either disability or
23 nondisability, the finding of the Commissioner is conclusive.
24 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

25 ALJ'S FINDINGS

26 At the outset the ALJ found plaintiff was insured for DIB
27 purposes through March 31, 2011 (Tr. 19, 21). At step one she
28

1 found plaintiff did not engage in substantial gainful activity
2 after the amended onset date, December 11, 2006, because his work
3 in 2008 was at less than SGA levels (Tr. 21). At steps two and
4 three, ALJ Ausems found plaintiff suffers from the medically
5 determinable impairments of history of traumatic brain injury in
6 2001, lumbar sprain, adjustment disorder with anxiety and
7 depressed mood, and alcohol abuse (DAA) in reported remission, but
8 they do not alone or in combination meet or equal the severity of
9 a Listed impairment (Tr. 21-22). She found plaintiff less than
10 completely credible and assessed an RFC for a range of light work
11 (Tr. 23-24). At step four, relying on the VE, she found Mr.
12 Sellery can perform his past relevant work as a housekeeper (Tr.
13 34). The ALJ asked the VE an alternative hypothetical with
14 additional limitations. Based on the VE's response, at step five
15 the ALJ alternatively found that there are other jobs plaintiff
16 could do, such as small products assembler, fishing reel
17 assembler, and document preparer (Tr. 35-36). The ALJ found
18 plaintiff was not disabled as defined by the Social Security Act
19 from the amended onset date through the date of the decision (Tr.
20 35).

21 ISSUES

22 Plaintiff alleges the ALJ erred when she weighed the opinion
23 evidence and at step four. He alleges the additional evidence
24 admitted by the Appeals Council warrants remand for benefits (EFC
25 No. 11 at 10-18). The Commissioner responds first that the Court
26 should affirm the decision because it is supported by the evidence
27 and free of error; and second, remand is unnecessary because

1 plaintiff fails to show the new evidence submitted to the Appeals
2 Council is material (ECF No. 15 at 10-19).

3 DISCUSSION

4 A. Standards for weighing opinion evidence

5 In social security proceedings, the claimant must prove the
6 existence of a physical or mental impairment by providing medical
7 evidence consisting of signs, symptoms, and laboratory findings;
8 the claimant's own statement of symptoms alone will not suffice.
9 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
10 on the basis of a medically determinable impairment which can be
11 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
12 medical evidence of an underlying impairment has been shown,
13 medical findings are not required to support the alleged severity
14 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
15 1991).

16 A treating physician's opinion is given special weight
17 because of familiarity with the claimant and the claimant's
18 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
19 1989). However, the treating physician's opinion is not
20 "necessarily conclusive as to either a physical condition or the
21 Ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
22 751 (9th Cir. 1989)(citations omitted). More weight is given to a
23 treating physician than an examining physician. *Lester v. Chater*,
24 81 F.3d 821, 830 99th Cir. 1995). Correspondingly, more weight is
25 given to the opinions of treating and examining physicians than to
26 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
27 (9th Cir. 2004). If the treating or examining physician's opinions
28

1 are not contradicted, they can be rejected only with clear and
2 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
3 ALJ may reject an opinion if he states specific, legitimate
4 reasons that are supported by substantial evidence. See *Flaten v.*
5 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
6 1995).

7 In addition to the testimony of a nonexamining medical
8 advisor, the ALJ must have other evidence to support a decision to
9 reject the opinion of a treating physician, such as laboratory
10 test results, contrary reports from examining physicians, and
11 testimony from the claimant that was inconsistent with the
12 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
13 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
14 Cir. 1995).

15 **B. Psychological limitations**

16 Plaintiff alleges the ALJ failed to properly weigh the
17 opinions of four examining professionals: (1) psychiatrist Robert
18 Baxley, M.D., on June 18, 2007; (2) neuropsychologist Allen
19 Bostwick, Ph.D., on November 21, 2007; (3) psychologist Joyce
20 Everhart, Ph.D., on November 20, 2008; and (4) psychologist Dennis
21 Pollack, Ph.D., on November 12, 2009 (ECF No. 11 at 10-16).

22 The ALJ notes psychiatrist Dr. Baxley evaluated plaintiff in
23 June 2007, for Labor and Industries after Mr. Sellery injured his
24 back on December 1, 2006. He was taking tylenol as needed for back
25 pain. Plaintiff's recent and remote memory were intact. Dr. Baxley
26 opined plaintiff did not have a mental health impairment related
27 to his back injury. No treatment was recommended. He opined
28

1 plaintiff's GAF was 60, indicating moderate symptoms or difficulty
2 functioning (Tr. 25, Tr. 352-360).

3 Next, the ALJ observes Dr. Bostwick evaluated plaintiff in
4 November 2007 for the Division of Vocational Rehabilitation (DVR).
5 Plaintiff was not taking any psychotropic medication. Zoloft had
6 been prescribed but was not covered by DSHS. Plaintiff presented
7 as "very socially appropriate," said he has always been a "people
8 person," and he drinks occasionally. Plaintiff was studying
9 software development in a two year college program that he began
10 four months before the evaluation. Dr. Bostwick opined plaintiff
11 did not present with a primary psychiatric disorder that would
12 account for his pattern of neurobehavioral deficits (Tr. 398). He
13 diagnosed dementia due to head trauma, with generally mild
14 neurobehavioral residuals involving higher-cortical and sub-
15 cortical abilities, and generalized anxiety disorder, generally
16 situational but with a chronic course. He opined plaintiff's GAF
17 was 60-65, indicating mild to moderate symptoms or difficulty
18 functioning (Tr. 399). Interestingly, plaintiff's activities
19 including cutting wood, taking out trash, using the computer,
20 driving, and playing golf (Tr. 25-26; 380-401).

21 Third, the ALJ considered and gave considerable weight to Dr.
22 Everhart's November 2008 opinion (Tr. 26-27, 32, 513-520). She
23 diagnosed, in part, malingering. Dr. Everhart opined plaintiff's
24 GAF was 65, indicating only mild symptoms or functional
25 difficulties (Tr. 519). The ALJ incorporated Dr. Everhart's
26 assessed limitations in the RFC.

27 Finally, the ALJ considered Dr. Pollack's contradicted
28 November 2009 opinion (Tr. 27, 576-585). He assessed two marked

1 and one moderate limitation in plaintiff's ability to perform
2 basic work functions, and a GAF of 55 (Tr. 581, 583). He believed
3 a more complete neuropsychological evaluation would be useful (Tr.
4 585). The ALJ rejected Dr. Pollack's opinion because it is
5 internally inconsistent. He assessed two marked limitations but
6 opined overall functioning is moderate. The ALJ notes Dr.
7 Pollack's testing suggests exaggerated symptoms, further
8 contradicting the existence of marked limitations (Tr. 33).
9 Internal inconsistencies may be considered by an ALJ when weighing
10 a report, *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603
11 (9th Cir. 1999), and it is the ALJ's responsibility to resolve
12 conflicts and ambiguities. *Magallanes v. Bowen*, 881 F.2d 747, 751
13 (9th Cir. 1989). An ALJ need not accept the opinion of any
14 physician if that opinion is brief, conclusory, and inadequately
15 supported by clinical findings. *Thomas*, 278 F.3d at 957 (citation
16 omitted). The ALJ's reasons for rejecting some of Dr. Pollack's
17 opinions are specific, legitimate and supported by substantial
18 evidence. *See Lester*, 81 F.3d at 830-831.

19 **C. Credibility**

20 Plaintiff does not challenge the ALJ's adverse credibility
21 finding. To aid in weighing the conflicting evidence, the ALJ
22 evaluated plaintiff's credibility and found him less than fully
23 credible (Tr. 24). Credibility determinations bear on evaluations
24 of medical evidence when an ALJ is presented with conflicting
25 medical opinions or inconsistency between a claimant's subjective
26 complaints and diagnosed condition. *Webb v. Barnhart*, 433 F.3d
27 683, 688 (9th Cir. 2005).

28 It is the province of the ALJ to make credibility

1 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
2 1995). However, the ALJ's findings must be supported by specific
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
4 1990). Once the claimant produces medical evidence of an
5 underlying medical impairment, the ALJ may not discredit testimony
6 as to the severity of an impairment because it is unsupported by
7 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
8 1998). Absent affirmative evidence of malingering, the ALJ's
9 reasons for rejecting the claimant's testimony must be "clear and
10 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

11 "General findings are insufficient: rather the ALJ must
12 identify what testimony is not credible and what evidence
13 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
14 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

15 As indicated, Dr. Everhart diagnosed malingering based on
16 plaintiff's results on several tests (Tr. 519). Nonetheless, the
17 ALJ's reasons are clear and convincing. She noted plaintiff was
18 able to work for several years after his traumatic brain injury,
19 and to drive, activities inconsistent with allegedly disabling
20 impairments. He testified he has daily headaches but told Dr.
21 Bostwick he suffers 3 per month. Medication was effective in
22 controlling anxiety in 2005, 2007, and 2009, yet plaintiff failed
23 to obtain mental health treatment on a regular basis and did not
24 take prescribed psychotropic medication regularly. Nor did he take
25 medication for allegedly disabling pain. Claimed problems with
26 concentration and memory are refuted by objective testing. (Tr.
27 24-25, 27).

28 Each is clear, convincing and supported by substantial
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1 evidence. See e.g., *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th
2 Cir. 2002)(proper factors include inconsistent statements,
3 inconsistencies between statements and conduct, and extent of
4 daily activities). Impairments that can be controlled effectively
5 with medication are not disabling for the purpose of determining
6 eligibility for SSI benefits. *Warre v. Comm'r of Soc. Sec. Admin.*,
7 439 F.3d 1001, 1006 (9th Cir. 2006). Although lack of medical
8 evidence cannot form the sole basis for discounting pain
9 testimony, it is a factor the ALJ can consider when analyzing
10 credibility. Noncompliance with medical care or unexplained or
11 inadequately explained reasons for failing to seek medical
12 treatment cast doubt on a claimant's subjective complaints. *Burch*
13 *v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

14 The ALJ's reasons are clear convincing, and fully supported
15 by the record. See *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
16 1996).

17 The ALJ considered plaintiff's credibility when she assessed
18 the conflicting evidence. The ALJ is responsible for resolving
19 conflicts and ambiguity in medical evidence. See *Lewis v. Apfel*,
20 236 F.3d 503, 509 (9th Cir. 2001). She has done so. The Court may
21 not substitute its judgment for the ALJ's resolution of the
22 conflicting evidence. See *Reddick v. Chater*, 157 F.3d 715, 720-721
23 (9th Cir. 1998).

24 The record fully supports the weight the ALJ gave the
25 conflicting evidence of psychological limitation.

26 **D. Physical impairment**

27 Plaintiff alleges the ALJ erred by partially crediting the
28 May 30, 2007, opinion of physical therapist Julianne Alford, MHA,
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1 PT, that plaintiff is capable of medium work. He asserts she is
2 not an acceptable source. The court should instead credit the new
3 evidence submitted to the Appeals Council, an opinion dated
4 February 25, 2010 [the day before the ALJ's decision] by
5 evaluating orthopedic doctor William Shanks, M.D., -- an
6 acceptable source. Plaintiff asks the Court to remand for an award
7 of benefits based on Dr. Shanks's opinion (ECF No. 11 at 16-18).
8 The Commissioner responds that the ALJ properly weighed the
9 evidence of both physical and psychological limitation and the new
10 evidence is not material (ECF No. 15 at 16, 18-19).

11 Plaintiff is correct Dr. Shanks is an acceptable source and
12 his opinion encompassed the period before the ALJ's decision. He
13 is also correct that the Appeals Council found the new evidence
14 did not provide a basis for changing the ALJ's decision.

15 Citing *Mayes v. Massanari*, 276 F.3d 453, 462-464 (9th Cir.
16 2001), the Commissioner answers that on review the Court must
17 determine whether the evidence is new and material (ECF No. 15 at
18 18-19). *See also* 42 U.S.C. § 405(g). The Commissioner asserts the
19 orthopedic doctor's opinion, that plaintiff's impairments would
20 affect his ability to perform sedentary work and he did not appear
21 capable of employment, is not material because it is extreme,
22 inconsistent with the evidence before the ALJ, and would not have
23 changed her opinion. The Commissioner notes the ultimate issue of
24 disability is reserved for the Commissioner (ECF No. 15 at 19).

25 To be material, the new evidence must bear directly and
26 substantially on the matter in dispute, and a claimant must show a
27 reasonable probability that the new evidence would have changed
28 the outcome of the hearing if the ALJ had the new evidence. *See*

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1 *Mayes*, 276 F.3d at 462.

2 In the Court's view plaintiff fails to meet his burden of
3 showing there is a reasonable probability that the new evidence
4 would have changed the outcome. While the physical therapist is
5 not an acceptable source, the ALJ found plaintiff *more* limited
6 than the therapist. The assessed RFC is consistent with the
7 medical record as a whole, including plaintiff's wide range of
8 physical and mental activities, as well as objective test results,
9 including MRI's of plaintiff's spine that show he suffers no
10 condition warranting surgery. Conservative treatment has been
11 recommended throughout the record.

12 Dr. Shanks opines plaintiff "cannot sit long enough to type
13 for any length of time," an opinion contradicted by plaintiff's
14 reported activities including playing video games, taking college
15 courses in computer work, and "loving" to drive. Perhaps more
16 significant, Dr. Shanks opines plaintiff's "major problem is from
17 the residuals of his head injury, which causes the balance and
18 incoordination [sic] problems" (Tr. 593). The record contradicts
19 his opinion. Plaintiff worked, as much as ten hours a day in 2006,
20 years after his head injury. There is no reasonable possibility
21 the new evidence would have changed the outcome of the hearing.
22 *See Mayes*, 276 F.3d at 462. Finally, plaintiff does not show good
23 cause for failing to obtain the evidence earlier so the ALJ could
24 have considered it before issuing her decision.

25 Remand is not required because plaintiff fails to show the
26 evidence is material, and he does not show good cause for failing
27 to obtain it earlier.

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1 **E. Step four**

2 Plaintiff asserts the ALJ erred when she assessed his
3 residual functional capacity (ECF No. 11 at 10). At step four,
4 plaintiff has the burden of proving he cannot perform any past
5 relevant work. When he alleges the RFC was in error, plaintiff
6 simply restates his argument that the ALJ improperly weighed the
7 evidence. As discussed above, the Court concludes the ALJ properly
8 weighed the opinion and other evidence. Plaintiff fails to show
9 the ALJ erred at step four. *See Stubbs-Danielson v. Astrue*, 529
10 F.3d 1169, 1175-1176 (9th Cir. 2008).

11 It is the role of the trier of fact, not this Court, to
12 resolve conflicts in evidence. *Richardson v. Perales*, 402 U.S.
13 389, 400 (1971).

14 **CONCLUSION**

15 Having reviewed the record and the ALJ's conclusions, this
16 Court finds the ALJ's decision is free of legal error and
17 supported by substantial evidence.
18 Accordingly,

19 **IT IS ORDERED:**

20 1. Defendant's motion for summary judgment (**ECF No. 14**) is
21 **GRANTED.**

22 2. Plaintiff's motion for summary judgment (**ECF No. 10**) is
23 **DENIED.**

24 The District Court Executive is directed to file this Order,
25 provide copies to counsel for plaintiff and defendant, enter
26 judgment in favor of defendant, and **CLOSE** this file.

27 DATED this 17th day of October, 2011.

28
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s/ James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE

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